

BEFORE THE  
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
DEPARTMENT OF INDUSTRIAL RELATIONS  
STATE OF CALIFORNIA

***In the Matter of the Appeal of:***

**NORTH BAY DRYWALL, INC.**  
P. O. BOX 750007  
PETALUMA, CALIFORNIA 94975

Employer

DOCKET 96-R1D5-1427

**DECISION**

**Background and Jurisdictional Information**

North Bay Drywall, Inc. (Employer) is a contractor specializing in drywall installation. On April 18, 1996, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Jimmie Jones, inspected a place of employment maintained by Employer (and other employers) at 3690 Laughlin Road, Santa Rosa, California (the site). On April 22, 1996, the Division issued to Employer Citation 1, alleging a regulatory violation of § 341.1(a)<sup>1</sup> [no Division permit to construct a building over 36 feet high], and proposing a \$500 penalty.

Employer timely appealed. As amended by Board Order dated January 14, 1997, the appeal challenged the violation's existence, the penalty, and the abatement requirements.

This matter was heard before Manuel M. Melgoza, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Santa Rosa, California, on January 30, 1997, at 9:00 a.m. John A. Levo, President, represented Employer. Jimmie Jones represented the Division. The parties introduced oral and documentary evidence, and the matter was submitted for decision on January 30, 1997.

**Summary of Evidence**

The testimonies of Jimmie Jones, for the Division, and John A. Levo, for Employer, do not conflict in material facts, and are summarized below.

---

<sup>1</sup>Unless otherwise specified, all references are to sections of Title 8, California Code of Regulations.

At the site, a construction manager (Wright Contracting) and a general contractor (McDevett & McDevett) were overseeing the erection of a winery, which consisted of a large warehouse and an adjoining office building. The warehouse portion was to be multiple stories, and 42 feet in height. The office portion was to be less than 36 feet high. Both parts of the structure were to be framed with heavy-gauge metal, the framing to be done by a structural steel sub-contractor. Employer's workers were to install the drywall on the office portion of the structure, by first placing lighter metal stud fill-ins between the supporting steel members. The stud fill-ins were non-load-bearing members of the structure, according to both witnesses. Various other contractors would install the steel roof deck, do the masonry work, install electrical equipment, etc.

The project originated in about October 1995. On November 13, 1995, the Division issued to McDevett & McDevett a permit to construct a building over three stories or 36 feet high, and the permit was for the site in question.<sup>2</sup> In February or March 1996, Levo first visited the site to assess and/or bid the drywall job. At that time, he noticed the general contractor's construction permit for the site was posted in the job site trailer. Levo thus concluded that was all that was necessary, so he did not attempt to obtain the same type of permit from the Division for the same activity.

Employer's workers arrived on the site in April 1996, and began placing the fill-in studs. Jones arrived on April 18, 1996, to investigate an accident involving the metal decking sub-contractor. On that day, only three contractors were present - Employer, the general contractor, and the decking sub-contractor. Jones learned that the decking sub-contractor had not obtained a permit to build over three stories high, so he cited that employer. Jones learned from Employer's foreman and later from Levo that it, too, had not obtained a permit for the same activity, so he cited Employer.

Using pages 6 and 30 of § C-41 of the Division's Policies and Procedures Manual, Jones explained that he was required, at multi-employer work sites, to cite every contractor who performed any of the activities listed on page 30, if they did not have the required permit. Since Employer's drywall work was included on that list, he felt bound to cite Employer (as well as the decking contractor) regardless of whether any other employer at the site had obtained a permit for the same activity. Jones thought the structural steel contractor may have obtained such a permit, but was not certain.

Using a work sheet (Exhibit 2), Jones explained how he computed the proposed penalty, following Division guidelines.

---

<sup>2</sup> Jones did not know this until he researched Division files during the hearing. Based on the Division's policies this would not, according to Jones, have affected the decision to cite Employer.

## **Findings and Reasons for Decision**

**The Division did not establish a violation of § 341.1(a).**

The provision the Division cited states, in pertinent part, as follows:

Any employer . . . subject to Section 341 of this Article shall apply for and obtain a permit, by filing a Permit Application Form with any Division's district or field offices. . .

The Permit application form shall contain such information as the Division may deem necessary to evaluate the safety of the proposed employments or places of employment.

By the Section's own terms only those employers subject to § 341 are required to obtain a permit from the Division. Section 341(a) provides:

. . . The Division shall require any employer who provides employment or a place of employment which by its nature involves a substantial risk of injury to obtain a permit prior to the initiation of any work, practice, method, operation or process of employment. Such employment or places of employment shall be limited to:

(1) Construction of trenches or excavations which are 5 feet or deeper and into which a person is required to descend.

(2) The construction of any building, structure, scaffolding or falsework more than three stories high or the equivalent height [36 feet].

(3) The demolition of any building, structure, or the dismantling of scaffolding or falsework more than three stories high . . .

(4) The underground use of diesel engines in work in mines and tunnels. [Emphasis added.]

Here, the activity triggering the permit requirement is the construction of a building more than three stories high or equivalent. The issue is whether this Employer was required to obtain the permit for this multi-employer work site, and where another employer had obtained a Division permit.

The Appeals Board answered this question in Fluor Daniel, Inc., OSHAB 90-948, Decision After Reconsideration (Nov. 20, 1991). The Board there held that at multi-employer construction sites, the duty to obtain a construction permit from the Division is on the employer "most directly involved in the activity for which the permit was issued." And, where one of the employers has already obtained a permit for that activity, other employers do not have to obtain the same type of permit later. Only one permit is needed for the activity for which it was obtained.

Here, Employer was not the one most directly involved in the activity for which the permit was required. Arguably, this was the steel erection contractor. And, another employer had obtained the construction permit months before North Bay Drywall's involvement at the site. The permit requirement's objective is to give the Division notice of the start of a project listed as a dangerous work activity so that the Division may hold safety conferences with the various employers and conduct regular inspections. Fluor Daniel, Inc., supra, at pp. 3-4. By the time Employer stepped onto this site, that objective had been fulfilled, another employer there having already obtained the relevant permit. Therefore, Employer was not required to obtain the permit, and should not have been cited.

While Jones felt bound by the Division's citation policy, it bears noting that under Labor Code §148.6, the Division is bound by the Appeals Board's interpretation of § 341.1(a) in Fluor Daniel, Inc., supra, since it was one of the parties to the Decision on Reconsideration.

Based on the foregoing, it is determined that the Division did not establish a violation of the Section cited. The citation is dismissed.

DATED: February 5, 1997

MANUEL M. MELGOZA  
Administrative Law Judge